



REPUBLIC OF KENYA



KENYA LAW
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**Lokaale v Republic (Miscellaneous Criminal Appeal E015 of 2023)
[2024] KEHC 3689 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E015 OF 2023
RN NYAKUNDI, J
APRIL 17, 2024**

BETWEEN

EMURAI AROPA LOKAALE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged in the trial court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that 26th August 2012 at Lokichar Centre, Turkana County, the applicant murdered Edapal Epul.
2. The applicant was convicted of the said charge and a twenty years sentence was imposed. The applicant has filed the present application and he urges the court to invoke section 333(2) of the CPC.

Analysis And Determination

3. I have perused the application and the chief issue for determination herein is whether the applicant is entitled to review of sentence under Section 333(2) of the Criminal Procedure Code.
4. The section provides as follows:
 - (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
5. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody



during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

6. In the case of *Bethwel Wilson Kibor vs Republic* [2009] eKLR the court expressed itself in the following terms: -

“By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

7. It follows then that the court should state in its decision that indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.

8. The punishment prescribed by the law for the offence of murder is death sentence. I take note that the applicant was found guilty of the offence of murder. The trial court in its sentencing decision stated that the mitigating factors were considered. The court did not clearly state whether section 333(2) was considered.

9. It is my considered view that the period spent in custody by the applicant should be considered. The court in sentencing should indicate whether the same has been factored in. The applicant was arrested on 28/08/2012 and convicted on 21/01/2014. He was granted bail but he did not get out. Therefore, the sentence should start running from 28/08/2012 when he was arrested. The application is therefore allowed.

DATED AND SIGNED AT ELDORET THIS 17TH DAY OF APRIL, 2024

In the Presence of

Mr. Onkoba for the DPP

Accused

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R. NYAKUNDI

JUDGE

